UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-841664-D2
Issued to: Randolph CLARK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2026

Randolph CLARK

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 30 March 1973, an Administrative Law Judge of the United States Coast Guard at Baltimore, Maryland, revoked Appellant's seaman documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as a bedroom utility (OBR) on board the United States SS PIONEER CONTRACTOR under authority of the document above captioned, between 7 December 1972 and 28 February 1973, Appellant was wrongfully a user of a narcotic drug.

Appellant failed to appear at the hearing and after the Administrative Law Judge questioned the Investigating Officer concerning the circumstances surrounding service of charges and notice of the hearing a motion to proceed in absentia was granted. The Administrative Law Judge entered a plea of not guilty to all charges and specifications.

The Investigating Officer introduced in evidence the testimony of two witnesses and a certification of the applicable shipping articles.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge of misconduct and the specification thereunder had been proved. The charge of violation of 46 U.S.C. 239b was considered surplusage and dismissed. He then served a written order on Appellant revoking all documents issued to Appellant.

The entire decision and order was served on 16 July 1974. Appeal was timely filed on 16 August 1974.

## FINDINGS OF FACT

Between 7 December 1972 and 28 February 1972, Appellant was serving as a bedroom utility (OBR) on board the SS PIONEER CONTRACTOR and acting under authority of his document on a voyage

that commenced at San Francisco, California, and terminated at Norfolk, Virginia. During this voyage, when the vessel was in Thailand, Appellant obtained a quantity of heroin. A portion of this heroin was brought aboard the vessel and used by Appellant while the vessel was at sea enroute Norfolk.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) the evidence concerning Appellant's admissions and the Public Health Service physician's diagnosis was improperly admitted and considered by the Administrative Law Judge; and

(2) Appellant was not accorded reasonable time to obtain counsel and prepare a defense.

APPEARANCE: San Francisco Neighborhood Legal Assistance Foundation by Susan G. Levenberg, Attorney at Law.

OPINION

I

The evidence presented by the Investigating Officer at the hearing consisted of the testimony of two witnesses and a certification of shipping articles showing that Appellant signed on the SS PIONEER CONTRACTOR on 7 December 1972, at San Francisco, California, and left the vessel on 28 February 1973, at Norfolk, Virginia. The first witness, Dr. Henry, a general medical officer at the Public Health Service Hospital, Norfolk, Virginia, testified to certain admissions made by Appellant concerning Appellant's use of heroin. He also testified that Appellant exhibited physical signs and symptoms consistent with a person withdrawing from heroin use and that Appellant was treated for withdrawal from heroin use. The second witness, Mr. Blasky, a special agent with the Bureau of Customs, testified to certain admissions made by Appellant while undergoing questioning at the Public Health Service Hospital. Mr. Blasky had been invited to assist in the Coast Guard investigation, was present during the Coast Guard's questioning of Appellant at the hospital, and apparently conducted his own questioning of Appellant in conjunction with and in the presence of the Coast Guard investigator.

Appellant contends that the admissions made to both Dr. Henry and Mr. Blasky and Dr. Henry's diagnosis were improperly admitted and considered by the Administrative Law Judge. In the introduction to this section of the argument Appellant correctly

recognizes that strict adherence to the formal rules of evidence is not required at the administrative hearing. However, citing 46 CFR 137.20-95(c) (now 46 CFR 5.20-95(c)), Appellant contends that "the regulations impose the necessity of greater conformity to the rules of evidence when the person charged appears without counsel." Noting that in this case Appellant was neither present nor represented by counsel, it is argued that the Investigating Officer should have presented his case in conformity with the rules of evidence and the applicable regulations. While conceding that the Investigating Officer must comply with the regulations, which is the case regardless of whether or not Appellant appeared or was represented by counsel, Appellant has misconstrued the meaning of 46 CFR 137.20-95(c). That subsection of the regulations provides,

> (c) In conducting a hearing the Administrative Law Judge will extend reasonable latitude to the person charged who does not have professional counsel to represent him. Investigating officers and counsel should be required to conform to the rules of evidence to a greater degree than persons charged without counsel.

The clear intent of this regulation is, in cases where the person charged in not represented by professional counsel, to further relax for the person charged strict adherence to the formal rules of evidence. Contrary to Appellant's contention, it does not increase the level of adherence to the formal rules of evidence normally required of the investigating officer. The fact that a hearing is conducted in absentia or without professional counsel does not change the general rule that strict adherence to the formal rules of evidence is not required.

II

Appellant next contends that Dr. Henry's testimony violated the physician-patient privilege and was improperly admitted. The only authority cited in support of this argument is 46 CFR 137.03-25 (now 46 CFR 5.03-25), which states,

> For the purpose of these proceedings, the physician-patient privilege is not considered to exist between a ship's physician and a seaman employed on the same ship.

Appellant urges that this regulation implies that a physician-patient privilege does exist between a seaman and a physician who are not employed on the same ship. This argument ignores that the physician-patient privilege is entirely a creature of statute and since there is no Federal statute on the matter, the privilege does not exist under Federal law and is inapplicable to proceedings brought under 46 U.S.C. 239. The unavailability of the

physician-patient privilege is discusses at some length in Appeal No. 1833 (ROSARIO) and Appeal No. 1838 (FORSYTH. In fact, in FORSYTH I addresses the very argument put forth by Appellant in this case and stated,

> If it should be urged that 46 CFR 137.03-25, which declares that there is no physician-patient privilege as to communications between a member of the crew of a ship and the ship's doctor, requires that a privilege be accorded in all cases under 46 CFR 137 other than those involving a ship's doctor and a member of the crew, I can say only that the argument is ill founded. The section of the regulations cited does not specify that there does not exist a privilege in a particular case. Since there is no Federal law according the "privilege" except in specific cases, the regulation does not preclude the introduction of medical evidence from doctors other than those serving on a ship.

Thus Dr. Henry's testimony concerning Appellant's admissions, his diagnosis, and his treatment was properly admitted and considered.

III

Next Appellant urges that the testimony of Mr. Blasky, the custom's agent, was improperly admitted and considered by the Administrative Law Judge. In support thereof, 46 CFR 137.20-125(c) (now 46 CFR 5.20-125(c)) is cited. That regulation provides,

> Any person other than a Coast Guard investigating officer may testify as to admissions voluntarily made by the person charged in the presence of the witness other than during or in the course of an investigation by the Coast Guard.

Appellant contends that the admissions testified by Mr. Blasky were made "during the course of the investigation and in direct response to questions of the Investigating Officer," and therefore are clearly inadmissable. I agree.

Mr. Blasky testified, concerning the circumstances surrounding his interview with Appellant at pages 8-9 of the Transcript. He stated that he had "received a call from Coast Guard Office of Investigation . . .," that he was present at the time Appellant was questioned by the Coast Guard, and that Appellant made various admissions to him during this questioning concerning Appellant's use of heroin. Nothing in the record in any way indicates that Mr. Blasky was conducting an investigation separate from the Coast Guard's investigation. The inescapable conclusion drawn from reading the record is that Mr. Blasky was an active participant in the Coast Guard's investigation. Under these circumstances, not

only was 46 CFR 137.20-125(a) violated, as urged by Appellant, but 46 CFR 137.20-120 (now 46 CFR 5.20-120) was not complied with. That regulation states,

> No person shall be permitted to testify with respect to admissions made by the person charged during or in the course of a Coast Guard investigation except for the purpose of impeachment.

Clearly the admissions testified by Mr. Blasky were made during or in the course of a Coast Guard investigation and they were not offered for the purpose of impeachment. It was error to admit and consider this evidence.

IV

Based on his earlier contentions, Appellant next argues that there was no evidence properly before the Administrative Law Judge to support the finding of misconduct. Since I have rejected the argument concerning the admissibility of Dr. Henry's testimony, this specific argument need not be considered. However, my agreement with Appellant that Mr. Blasky's testimony was improperly admitted raised an additional issue; whether without Mr. Blasky's testimony the evidence is sufficient to support the Administrative Law Judge's ultimate finding. In my opinion it is sufficient.

Dr. Henry testified that upon admission to the Public Health Service Hospital, Appellant exhibited signs and symptoms consistent with heroin withdrawal and that Appellant admitted to having used heroin and to be suffering from heroin withdrawal. He also testified to treating Appellant for heroin withdrawal. Appellant admitted to Dr. Henry that he had been using heroin regularly for the past 35 days. This testimony, contained at pages 5-6 of the Transcript together with the certification of shipping articles, is proof of Appellant's use of narcotic drugs while serving under the authority of his document aboard the SS PIONEER CONTRACTOR.

There is nothing in the record that casts any shadows on Dr. Henry's testimony. The Administrative Law Judge, having observed both witnesses on the stand, noted that both lacked the normal bias of a party in interest and that their testimony was credible and should be given great weight, Decision and Order, page 9. Dr. Henry's testimony was specifically found to constitute "substantial evidence in proof of the wrongful use of narcotics charged in the specification." Decision and Order, page 10. Based on the above I have concluded that, disregarding Mr. Blasky's testimony, there is reliable, probative, and substantial evidence clearly establishing that Appellant was a wrongful user of a narcotic drug as alleged in the specification.

V

Appellant's final argument is that he was not accorded reasonable time to obtain counsel and prepare a defense.

Charges were served on Appellant on 7 March 1973, with the hearing scheduled two days later. Contrary to counsel's suggestion in her brief that Appellant may not have been informed that he could have been represented by counsel, the reverse of the charge sheet lists the rights afforded to persons charges under 46 U.S.C. 239, including the right to be represented by counsel. Also explained on the reverse of the charge sheet are the consequences of failing to appear at the hearing and the proper method of obtaining a change in time or place of the hearing. Appellant signed this form acknowledging that the substance of the complaint, the nature of the proceedings, his rights, and the results of his failure to appear were fully explained to him. Had Appellant felt he needed more time to obtain counsel and prepare a defense he should have appeared at the hearing and requested it. By failing to appear he waived any objections to proceeding with the hearing as scheduled on the charge sheet.

I note that in support of this argument Appellant has cited 46 CFR 137.03-25(c) (now 46 CFR 5.05-25(c)). That regulation applies only to cases where service is made by mail and is inapposite to the facts of this case. Appellant fails to point out any impropriety concerning the service of charges and notice of the hearing. Thus Appellant's final contention on appeal is found to be without merit.

ORDER

The order of the Administrative Law Judge dated at Baltimore, Maryland, on 30 March 1973, is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 5th day of June 1975.

INDEX